IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1314 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOHD.ILYAS @ IJJU BABUMIYA SHAIKH & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR EE SAIYED for Appellant(s) : 1 - 2.MR SIKANDER SAIYED for Appellant(s) : 1 - 2.
Mr.P.D.Bhate, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 27/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE SHARAD D.DAVE)

1. The appellants herein were accused nos.1 and 2 respectively before the trial Court facing charge of murder along with acquitted accused Abdul Wahid @ Rani Abdul Razaq Shaikh and Mohammed Arif Mohanmmed Ismail Shaikh. All of them tried for the murder of Ayesha Mohammedbhai who happened to be the mother-in-law of appellant no.1 Mohammed Ilias @ Ijju Babumiya Shaikh allegedly committed by them on December 20, 1997 around 18.30 hours at her house in Randher road area of Surat.

2. The case of the prosecution in brief can be stated :

2.1. The appellant no.1 is married to Firoza but the married life was not so smooth. His wife Firoza alleged ill-treatment by appellant No.1 and approached some Women's Organization so also Mahila police station at Surat a few days prior to the incident. It was alleged by Firoza that appellant No.1 was involved in illegal activities and used to ill-treat her and Firoza's mother Ayesha said that Firoza need not spend life with appellant No.1. Somehow, the matter could not be reconciled and was then posted to 30.12.1997.

2.2 On the day of the incident, when deceased Ayesha and her daughter Firoza were at home, the appellants who were real brothers approached them

with daggers in their hands. They were contacted by acquitted accused persons. It is the case of the prosecution that appellant No.2 caught hold of Ayesha and both the appellants inflicted knife blows. When Firoza tried to escape, she was prevented by acquitted accused persons, however, she could make her way out and she escaped. She says that in the meantime, accused Nos.1 and 2 escaped after causing injury to the deceased. Firoza then lodged FIR with Rander Police Station of Surat City. The offence was registered on the basis of that information and investigation started. However, before lodging the FIR, Firoza along with one Shirishbhai and Meenaben took the deceased to Hospital and on being advised, to shift her to some big hospital, she took her to another hospital and ultimately at the third hospital, she was declared dead. On the basis of information received in the FIR, the police started investigation and recorded various statements, prepared inquest panchnama and ultimately arrested the accused appellants on 22.12.1997. While the appellants were in custody, on their discloser, daggers were discovered and were found to carry blood marks. They were sealed and sent to FSL for investigation and were found to carry blood stains of the group of the deceased. The police, therefore, filed chargesheet in the court of Chief Judicial Magistrate, Surat who in turn, committed the case to the Court of Session and Sessions Case No.122 of 1998 came to be registered.

2.3 The charge was framed against the appellants and the acquitted accused at Exh.5. They all pleaded not guilty to the charge and came to be tried. On the basis of the evidence led by the prosecution, the trial Court came to a conclusion that the charges against the original accused Nos.3 and 4 were not established and, therefore, recorded their acquittal. Against that acquittal, the State has not preferred any appeal.

2.4 So far as original accused Nos.1 and 2 (appellant Nos.1 and 2 respectively) are concerned, the trial Court convicted them for the offences punishable under Section 302 read with Section 34 of Indian Penal Code and sentenced them to undergo imprisonment for life and to pay fine of Rs.400/-, in default, to undergo SI for a period of two months. Aggrieved by the said judgment and order, present appeal is preferred.

3. We have heard learned advocate Mr.E.E.Saiyed for the appellants and Mr.Bhate, learned APP for the respondent State.

4. It would be appropriate to record that appellant No.2 is reported absconding since 26.5.2002 while enjoying temporary bail.

5. Learned advocate Mr.Saiyed submitted that the prosecution case rests on deposition of solitary eye witness Firoza who happens to be the wife of

appellant No.1 and first informant. He submitted that first informant then had some grievance against appellant No.1. The dispute was going on and on the day of incident also, few hours prior to the incident, there was heated discussion at the Women's Cell where first informant insisted for divorce and was supported by her mother deceased Ayesha. On the other-hand, appellant No.1 was keen on having reunion in light of the fact that Firoza had two young daughters from their wedlock. Under these circumstances, evidence of first informant Firoza has to be given a closer scrutiny because the case depends mainly on her solitary evidence.

5.1. Mr.Saiyed submitted that it has been admitted by Firoza that she did not disclose before the doctor to whom she took her ailing mother after the assault that the assault was committed by the appellants. If she had really seen the incident and had seen the appellants committing the assault, obviously she would have disclosed this fact to the doctor and, therefore, her FIR and evidence are only an afterthought chosen to take revenge from the appellants.

5.2. Mr.Saiyed submitted further that the scenario has now changed. The first informant is now in such a social economic stress that she needs protection of appellant no.1. This she has realized and is, therefore, keen to have appellant no.1 even bailed out for temporary. Mr.Saiyed submitted that

the disputes between the spouses are resolved and the track record shows that even while appellant no.1 was out of jail temporarily, they both absconded. Mr.Saiyed submitted that the first informant is not supported by her in-laws nor does she have anybody who can take care of her on her parental side. She is left high and dry. She has two young daughters to look after and the poverty is an inevitable situation that she is facing. According to Mr.Saiyed, the case, therefore, requires sympathetic consideration. Mr.Saiyed submitted that the case can be viewed from the angle that appellant no.1 was enraged because of the attitude of the first informant of insisting for divorce and the attitude of his mother-in-law insisting that the reunion is not possible and in that heat, he lost self control and the incident occurred.

5.3. Mr.Saiyed submitted that the appeal may be allowed and the conviction may be set aside or in the alternative may be altered to the one under Section 304 of the Indian Penal Code.

6. Learned APP Mr.Bhate has opposed this appeal. According to him, the evidence has to be assessed qualitatively and not quantitatively. He submitted that the evidence of Firoza is a sterling character. She is an eye witness to the incident. Her present at the house is very natural. When the incident has occurred inside the house, it would not be justified to expect independent witnesses.

Firoza's evidence is tested on the touchstone of cross-examination and has remained unshaken. That Firoza is the wife of appellant no.1 and has no reason to falsely implicate him. He, therefore, submitted that the appeal may be dismissed.

6.1. Mr.Bhate submitted that there is total absence of circumstances which would attract Section 304. There is evidence on record that the case would fall under any of the exceptions to Section 300 or general exceptions and when there is trustworthy evidence of the first informant, the appeal may be dismissed.

7. We have examined the record and proceedings in light of the submissions made by rival sides before us and we find that P.W.1, P.W.2, P.W.3, P.W.5, P.W.9, P.W.10 are the witnesses who have not supported the prosecution case and have been declared hostile to prosecution. The first informant Firoza is examined as P.W. 1 Exh.26. She says that she was married to appellant no.1 in the year 1995-96. She says that she then went to her matrimonial home where appellant no.1 used to cause physical cruelty to her. She also says that appellant no.1 was involved in a robbery and a revolver was recovered from him. She says that she was taken to her parental house by her mother Ayesha and was told that she should not continue with the marital relationship. She says that at that time she was pregnant. She delivered a baby girl after about a month or so. She says that after

about 6-7 months, the family members of appellant no.1 were asked to come and fetch her but they refused that and conveyed that the daughter is not of appellant no.1. She further deposed that appellant no.1 has an affair with a lady called Jamna. She says that because the appellant was causing lot of harassment, on the day of the incident she went to the police station along with her mother. They were asked to come again on 30th. On that very day, her mother was called at the Women's police station around 4.00 p.m., and her statement was also taken. Thereafter, they went home. At that time, appellant nos.1 and 2 went there. They both had knives in their hands and they committed assault on the deceased. She says that she raised shouts and started running. At that time, her brother-in-law Arif and Raja caught hold of her, however, she could escape. In the meantime, Ilias had escaped after committing assault on the deceased. She says that her mother came out of the house. In the meantime, Shirishbhai arrived and took deceased Ayesha to hospital. She says that the deceased was taken in auto-rickshaw to Dr.Vipul Kothari who refused to give treatment and, therefore, they went to hospital opposite Rupali cinema. There also, they were refused treatment. Therefore, they went to Dr.Upadhyay where they were told by Dr.Upadhyay that Ayesha had expired and it was around 6.30 at that time. She says that the place of incident was shown by her to the police. She says further that muddammal article nos.6 and 7 clothes worn by her mother at the time of incident. She also

identifies the knife with which her husband had caused injury. She then says that muddammal article no.8 was with her brother-in-law Faiz appellant no.2. She identifies them in the Court.

7.1. The witness is cross-examined at length and she admits that she had not stated before any of the doctor that her husband had caused injury to the deceased but then she explained that because it was not asked to her, she did not disclose this fact. She denies the suggestion that because of a misunderstanding about her husband having an affair with Jamna, she has falsely implicated him. She also denies the suggestion that she has deposed at the behest of somebody else.

7.2. On examining evidence of Dr.Qureshi, we find that the deceased had as many as five injuries. Two of the injuries were in form of stab wounds. There was one contused lacerated wound and two incised wounds over inner side of the lower end of the fore-arm just above the left wrist. The doctor has opined that the injuries were individually and jointly sufficient to cause death in ordinary course of nature. According to the doctor, the death of the deceased Ayesha was caused because of serious injury to pancreas and abdomen. The cause of death was shock due to hemorrhage, stab wounds and injury to liver omentum. Thus, it is clear that the death of deceased Ayesha was homicidal.

7.3. The weapon has been discovered by accused no.1 and the panchanama in that regard has been properly drawn. It is at exh.34. Of course, the panch Exh.33 has not supported the prosecution case wholly and has been declared hostile by the prosecution. The second panch Saiyed has also not supported the prosecution case. However, the investigating officer has proved this discovery in his deposition. The panchanama indicates that both the weapons discovered were deadly and dangerous. The blade was of the size of 9 ½ inches with sharp edges pointed blade. Discovery, though panch witnesses, have not supported, we find has been properly established by the investigating officer. Both the weapons are big in size. They both carried blood marks and the blood found on that is certified to be of the group of the deceased. All these factors support the version of the eye witness. It, therefore, cannot be said that the trial Court committed error in appreciating the evidence. There are no reasons shown to us for interference in the judgment by entertaining this appeal. The appeal, therefore, must fail.

8. We have also examined the contention that the case would attract Section 304 and not Section 302 of the Indian Penal Code. However, we are at loss to find out any material on record which would attract any of the exceptions to Section 300 or any of the general exceptions in the Indian Penal Code. The episode at the police station was over in the afternoon of the day and keeping that in mind, the

appellants approached the house of the deceased with daggers in their hands. What else could be the intention of such persons who go to the house of the deceased armed with deadly dagger and commit assault on the lady without even having discussion or dialogue. It is no body's case that there was any altercation, quarrel, fight or scuffle and, therefore, it is not possible for us to accept the contention that Section 304 would be attracted and not Section 302 of Indian Penal Code.

9. Last but not the least, we find some substance in the submission made by learned advocate Mr.Saiyed that it is the first informant lady who is suffering. The entire proceeding started on her lodging the FIR and now she repents for her action. The disputes have been resolved between the parties and, therefore, the matter may be viewed sympathetically. We understand and appreciate the difficult situation faced by the first informant. A young lady with two minor children is not getting support either from her matrimonial or from her parental home, but the Court cannot assist such a victim unless a legitimate right accrues to a person. Sympathies cannot be a replacement/substitute of the law.

10. For the foregoing reasons, we are of the view that appeal does not merit acceptance. The appeal must fail and is dismissed.

(A.L.DAVE, J) (SHARAD D DAVE, J)

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